Supreme Court, U.S.
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No. 91-1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

McDERMOTT INCORPORATED and
THE BABCOCK & WILCOX COMPANY,

Petitioners,

v.

INTERNATIONAL INSURANCE COMPANY and
UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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July 7, 1992

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in holding that a standard "service of suit" clause does not require dismissal of insurers' declatory judgment action?

LIST OF PARTIES

Respondents, International Insurance Company and United States Fire Insurance Company, were plaintiffs below. Petitioners, McDermott Incorporated and The Babcock & Wilcox Company, were defendants below.

The parent corporation of International Insurance Company and United States Fire Insurance Company is Crum and Forster, Inc.

Crum and Forster, Inc., is a wholly-owned subsidiary of Xerox Financial Services, Inc., which in turn is a wholly-owned subsidiary of Xerox Corporation.

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STATEMENT OF THE CASE

The facts are correctly and succinctly set forth on pages 94 and 95 of the Fifth Circuit's decision in *International Ins. Co. v. McDermott, Inc.*, 956 F.2d 93 (5th Cir. 1992). This suit is a declatory judgment action filed by International Insurance Company and United States Fire Insurance Company against McDermott

Incorporated and The Babcock & Wilcox Company, to determine the scope of coverage, if any, under ten insurance policies. Defendants-insureds responded to the suit by filing their own, limited action in Texas, then moving for dismissal of this case on the grounds of the "service of suit" clause in the policies.

All ten policies of insurance subscribed to by International Insurance Company and United States Fire Insurance Company to The Babcock & Wilcox Company and McDermott Incorporated contained the following clause:

> "4. *SERVICE OF SUIT*
> It is agreed that in the event of the failure of underwriters hereon to pay any amount claimed to be due hereunder, underwriters hereon, at the request of the assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.
>
> It is further agreed that service of process in such suit may be made upon Faris, Ellis, Cutrone, Gilmore, Lautenschlaeger, Counsellors at Law, 1207 Whitney Building, New Orleans, Louisiana, 70130 and that in suit instituted against any one of them upon this policy, underwriters will abide by the final decision of such court or appellate court in the event of an appeal.
>
> The above-named is authorized and directed to accept service of process on behalf of the underwriters on any such suit and/or upon the assured's request to give a written undertaking to the assured that they will enter a general appearance upon the underwriters' behalf in the event such suit shall be instituted."

None of the policies issued by respondents contained a forum selection clause.

ARGUMENT

I.

THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT A SERVICE OF SUIT CLAUSE DOES NOT COMPEL DISMISSAL OF AN INSURER'S DECLATORY JUDGMENT ACTION.

As the Fifth Circuit correctly noted, "the service of suit clause itself speaks only to actions brought by the insured." *International Ins. Co. v. McDermott, Inc.*, 956 F.2d 93, 95 (5th Cir. 1992). A service of suit clause thus is not and cannot be a device for compelling dismissal of an insurer's suit. Petitioners would have this Court construe a simple service of suit clause as giving to an assured an unqualified right to deprive an insurer of its right to seek a declatory judgment or any other redress in court, by simply choosing another forum and having the insurer's suit dismissed. There is nothing in the service of suit clause which even suggests such an untenable result.

The Fifth Circuit correctly held that the service of suit clause does not give to the assured the right to prevent the insurer, respondents here, from bringing an action of their own in a forum of the insurer's choosing.

II.

THE FIFTH CIRCUIT'S DECISION IN *INTERNATIONAL* DOES NOT CONFLICT WITH ANY OTHER COURT DECISION.

The Fifth Circuit's decision below does not conflict with any other decision of any other circuit court or with any decision of this Court. There is nothing about this litigation or the Fifth Circuit's decision resolving this dispute that requires the intervention of the United States Supreme Court.

City of Rose City v. Nutmeg Insurance Company, 931 F.2d 13 (5th Cir. 1991), *cert. den'd*, ___ U.S. ___, 112 S.Ct. 301, 116 L.Ed.2d 244, and *Constance B. Foster v. Chesapeake Insurance Company, Ltd.*, 933 F.2d 1207 (3d Cir. 1991), both are limited to the issue of whether the service of suit clause prevents removal to federal court of state court actions filed by the assured; they do not address the issue of whether the service of suit clause has any bearing on suits brought by the insurer. The decision of the Sixth Circuit in *In Re Delta America Re-Insurance Co.*, 900 F.2d 890 (6th Cir. 1990), supports the decision of the Fifth Circuit in *International* below.

Both the *Bremen v. Zapata Offshore Company*, 407 U.S. 1; 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), and *Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) concern clear and unequivocal forum selection clauses, not the service of suit clause.

The decision of the Fifth Circuit below in *International* represents a clear, fair, and common-sense approach to construing the service of suit clause. It does not conflict with any other decision of any court, because there is no other reported case that involves parties, like petitioners here, who have sought to use the service of suit clause to defeat an insurer's right to file suit. The Fifth

Circuit correctly held that there was nothing in the insurance policy to suggest that the service of suit clause could be used to defeat an insurer's right to file suit.

CONCLUSION

The service of suit clause means what it says: The insurer must submit to the choice of forum in an action brought by the insured. The service of suit clause does not prohibit an insurer from filing suit. If such was the intent of the parties, the policies would have so stated. The policies do not, and the Fifth Circuit refused to permit petitioners to use the service of suit clause to prevent International Insurance Company and United States Fire Insurance Company from pursuing their declatory judgment action.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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– *(con't.)* –

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